IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 517.

THE SIROCCO COMPANY,

Petitioner,

—against—

THE CITY OF MIAMI.

PETITIONER'S REPLY BRIEF.

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PETITIONER'S REPLY BRIEF.

The Facts.

The facts are accurately stated in the statement of facts found at pages 4-9 of the petition herein, and it is only necessary to point out that whereas no *patent* was issued covering the lands in question until January 2, 1932, petitioner's rights stem from the valid homestead *entry* made by Pent in 1890 covering all of the lands in question.

On page 2 of respondent's brief it is stated that the petitioner asserts its title by virtue of two warranty deeds from Francis S. Whitten executed in 1933 and 1938 respectively. It should be pointed out that it is clearly alleged in the bill of complaint herein (R. 66, 67) that on June 23, 1925, before the land in question had been appropriated by the respondent, Francis S. Whitten, who was the holder of equitable title from Pent, executed a *warranty* deed to the Manhattan Real Estate Company covering all of the land, which corporation in turn on January 27, 1927 delivered its *warranty* deed to the petitioner covering all of the said land.

POINT I.

Petitioner's rights to the land in question were fixed by the valid entry made by Pent and after the unlawful appropriation of the lands by the respondent no "recognition" of an illegal cancellation of those rights could deprive petitioner of its title to the land.

Much is made in respondent's brief of the fact that after the Department of the Interior had determined that Pent's entry had been unlawfully cancelled and should be reinstated, W. ten asked for a rehearing. Petitioner's rights had already been acquired in 1927 when it received a deed from the Manhattan Real Estate Company which was possessed of all of Whitten's rights by virtue of his 1925 deed to it (R. 66, 67). Whatever Whitten might do thereafter could in no way affect petitioner's title. However, even if the acts of Whitten had been binding upon the petitioner, such acts did not invalidate the equitable title acquired under the Pent entry.

The decision of the Department of the Interior, in modifying the Commissioner's decision which is so heavily relied upon by respondent (Respondent's Brief, pp. 8 and 9) states expressly that:

> "* * * Pent acquired such a title to lot 2, plat of 1875 as would prevent a further disposal of the land by the government to any one other than Pent" (R. 51).

The Department quoted the case of *Cornelius* v. *Kessel*, 128 U. S. 456 to the effect that:

> "* * * By such entry and payment the purchaser secures a vested interest in the property

> and a right to a patent therefor, and can no more be deprived of it by order of the commissioner than he can be deprived by such order of any other lawfully acquired property" (R. 51).

The decision on rehearing was merely to the effect that a patent would issue directly to Whitten rather than on the valid homestead entry of Pent (R. 52). This in no way affected the validity of petitioner's title through Pent's entry. Any title acquired by Whitten in the land in any fashion had already been conveyed by him with full warranty, to petitioner's predecessor in title, Manhattan Real Estate Company (R. 66, 67).

The conclusive demonstration of the survival of the valid Pent entry through all the subsequent litigation is given in the case of *Cornelius* v. *Kessel*, 128 U. S. 456, quoted on page 18 of petitioner's brief, where the court said at page 463:

> "The interest of Davidson in the tract, which embraces the premises in controversy, acquired by him by his entry, was not lost or impaired by the order directing its cancellation. That order was illegally made, and those claiming under him can stand upon the original entry and are not obliged to invoke the subsequent reinstatement of the entry by the Commissioner."

The reinstatement of the Pent entry by the Department of the Interior confirmed petitioner's rights, but petitioner can stand upon the original valid entry.

Considerable reliance is placed in petitioner's brief on the cases of *Work, et al.* v. *Read*, 10 Fed. 2nd 637, 23 Fed. 2nd 139, and *Read* v. *Work*, 32 Fed. 2nd 413.

which contain language to the effect that the lands in question were public. *The most cursory examination of these cases reveals that the Pent claim was not in suit and that the only decision which was made was that the Gleason patent was invalid.*

In *Work, et al.* v. *Read*, 10 Fed. 2nd 637, the court said at page 639 that the claim of Whitten must be swept aside. This applied only to the claim of Whitten under the Gleason patent and had no application to the Pent entry. The land was declared to be public land *as against the claim of Gleason.*

Respondent states at page 8 of its brief that the Department of the Interior held, "that this was government land until 1931", and cites the record at pages 52 and 53 as authority for this proposition. It can only be said that a minute inspection of all parts of the record *fails to reveal* any such holding by the Department.

POINT II.

The fact that no valid patent covering the lands in question was issued until 1932 has no bearing on the equitable title of petitioner and its predecessors dating from 1890 when the Pent entry was made.

It is contended by respondent that the order made on the motion for rehearing before the Department of the Interior in 1932 (R. 52) "eliminated" the Pent entry (Respondent's Brief, p. 13). Petitioner categorically denies this and the reasons for the denial are given in Point I above.

Respondent goes on to say that if Whitten had been entitled to a patent as grantee of Pent, he need not have made a new application. The fact that he did

make an application for a patent is taken by respondent to be a "recognition of the futility of such a claim" (Respondent's Brief, p. 14).

Petitioner insists that it is immaterial why such application was made. Nevertheless, an examination of the record which reveals why such application was made may set to rest any doubts raised by respondent's contention. The conveyances of Pent and his wife under which petitioner's claims to the land in question arise, cover only 31.10 acres of the 40.50 acres in lot 2 (R. 31). It was therefore felt that a patent should issue to Whitten rather than to Pent, so that doubts as to the validity of his title on the remaining 9.40 acres should be set at rest. *No part of the land in suit is contained in the 9.40 acres for which deeds from Pent are missing, and therefore the rehearing in no way affects the case at bar.*

The issuance of a patent directly to Whitten was entirely his own idea and was not required by the federal government. His equitable title had already been transferred to petitioner. His subsequent conveyances at most finally transferred the legal title to petitioner.

POINT III.

The right of way over the lands in question has not been acquired by the respondent by prescription or adverse possession and petitioner is not guilty of laches.

Respondent quotes two sections of the Florida law in an effort to establish that the statute of limitations on petitioner's claim has run, and that a right of way over the land in question has been acquired by the respondent by adverse possession.

Additional citation of the law of Florida will serve to dispose of these claims.

Section 4652 of the Compiled General Laws of Florida 1927 cited by the respondent (Respondent's Brief, p. 15) actually reads as follows:

> "No action for the recovery of real property or for the recovery of the possession thereof shall be maintained unless it appears that the plaintiff, his ancestor, predecessor or grantor was seized or possessed of the premises in question *within* seven years before the commencement of such action" (Florida Acts of 1872, c. 1869, §2).

Section 4653 of the same compilation of laws, the next section, reads as follows:

> "No cause of action or defense to an action founded upon the title to real property or to rents or to service out of the same shall be effectual unless it appear that the person prosecuting the action, or making the defense or under whose title the action is prosecuted or the defense is made or the ancestor, predecessor or grantor of such person was seized or possessed of the premises in question within seven years before the accruing of the right of action or defense in respect of which such action is prosecuted or defense made, *or unless it appear that the title to such premises was derived from the United States or the State of Florida, within seven years before the commencement of such action; and the period of limitation shall not begin to run until the passage of the title from the State or the United States*" (Florida Acts of 1872, c. 1869, §3). (Italics added.)

This statute indicates that so long as legal title remains in the United States, no title can be acquired by adverse possession, and the cases are in accord with this interpretation.

In the case of *Hagan* v. *Ellis*, 39 Fla. 463, 22 So. 727, it was held that where an entry was made in 1854 and patent was not issued until 1891, title to the property could not be acquired as against the entryman in the interim period by adverse possession, since title remained in the United States.

This Honorable Court, in *Redfield* v. *Parks*, 132 U. S. 239, held that while the legal title to land remained in the United States, the statute of limitations did not run.

But there is a further reason why respondent has acquired no right of way over the lands in question. It is well settled in Florida that a right of way by prescription can only be acquired by twenty years' use and occupation, and that the seven year period applicable to title to real estate is not controlling.

In *Vereen & Sons, Inc.* v. *Houser*, 123 Fla. 641, 167 So. 45, the court said at page 648:

> "* * * While title to real estate may be acquired by the exercise of actual, exclusive adverse and continued possession for a period of seven (7) years under color of title under our statute, that period of limitation cannot be held to apply to the acquisition by prescription of an easement * * *."

The case of *Zetrouer* v. *Zetrouer*, 89 Fla. 253, 103 So. 625; 95 Fla. 976, 117 So. 383, held that land for a street might be acquired by prescription in Florida,

but that a twenty year period was required. This decision was followed in *Dade County* v. *Snyder*, 140 Fla. 135, 191 So. 185.

See also *Couture* v. *County of Dade*, 93 Fla. 342, 353, 112 So. 75, 79.

It is apparent from the foregoing that respondent's contention that it obtained a right of way by adverse possession is without merit.

Respondent's final contention is that petitioner has slept on its rights and "recognized" the rights of the respondent. In answer to this contention, it may be noted that the bill of complaint alleges that *respondent was fully aware that the land in question was private property at the time when it unlawfully appropriated it* (R. 70, 72). It is further alleged that petitioner could not fence off or obstruct the land in question to prevent its occupation and use by respondent (R. 74).

Respondent was aware of petitioner's claim of title, and proceeded to build the roads in question in defiance of that claim. Petitioner did nothing to give the respondent the impression that the land had been dedicated to the City of Miami. Once the roads had been built, the fact that petitioner did not commence suit until after its rights had been finally established before the Department of the Interior in no way damaged respondent.

No action was taken by respondent in reliance upon petitioner's inactivity, so the doctrine of laches has no application whatsoever.

All of the contentions now raised by the respondent were raised before the Supreme Court of Florida on

the previous appeal, and the court did not consider that there was sufficient merit in them to find them worthy of discussion (Petitioner's Brief, p. 27). In fact the court stated that:

> "* * * If Whitten or Wayne Realty & Investment Company had been homestead entrymen in legal course, or had legally preempted or taken possession of lots 1 and 2, there would be no question of Appellee's equitable title and its right to recover * * *" (Petitioner's Brief, p. 25).

The case was therefore decided solely upon the Federal ground, and while the Supreme Court of Florida, in considering the amended bill of complaint on the appeal herein involved, wrote no opinion, it is unreasonable to assume that its decision was based upon grounds which it rejected on the previous appeal.

CONCLUSION.

The respondent's brief is an attempt to raise collateral issues and to go into what it considers to be the merits of the case at bar. It does not in any way meet the contentions of the petition:

That this court has jurisdiction of the action;

That a substantial federal question is involved;

That the decision of the Supreme Court of the State of Florida is in direct conflict with applicable decisions of this court.

For these reasons it is respectfully submitted that the petition should be granted.

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